MUKHTIAR SINGH A/L AMAR SINGH & ANOR.

v.

NGAN YIP BUN & ANOR.

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[CIVIL SUIT NO. 22-188-91]
24 NOVEMBER 1992

CONTRACT: Agreement for sale of house - Plaintiffs paying deposit - Agreement providing that balance of purchase price to be used to redeem property - Redemption sum greater than balance due - Defendants refusing to pay difference - Plaintiffs seeking specific performance - Whether agreement provided that if redemption sum was greater than purchase price, agreement was null and void - Whether plaintiffs entitled to specific performance - Whether sale and purchase agreement enforceable.

The plaintiffs entered into a sale and purchase agreement with the defendants to purchase a dwelling house for a sum of RM182,000 and paid 10% at the time of the execution of the agreement. *As per* the agreement the balance was to be paid to the purchaser's solicitors as stake holders to redeem the house held as security by the bank (UMBC). The remaining balance if any was to be paid to the vendors' solicitors as stake holders. The plaintiffs' bankers approved a loan of RM160,000 and thereupon the plaintiffs deposited a further sum of RM3,800 with their solicitors and wrote to the defendants' solicitors and to UMBC. UMBC replied stating that the dues of the defendants was RM203,260.36 and therefore the plaintiffs sought confirmation from the defendants that they would pay the balance to redeem the property. The defendants refused to do so and the plaintiffs sued for specific performance of the agreement.

The defendants claimed that as the parties proceeded on the footing that the dues to UMBC will be less than RM182,000, the agreement was unenforceable.

Held:

[1] Nowehere in the agreement does it stipulate that if the amount owing to UMBC was in excess of RM182,000 the said agreement was to be annulled. A careful reading of the Third Schedule of the agreement shows quite clearly that the pre-conditions stipulated therein were linked to the terms on which the vendors' solicitors were authorised to release the sum paid as deposit to the vendors.

[2] The last sentence in the Third Schedule makes it clear beyond any doubt that it was an independent and overriding condition that vacant possession had to be delivered to the plaintiffs by the defendants upon full payment of the balance of the purchase price to UMBC, which the plaintiffs were ready and willing to do.

[3] The defendants must have known what they owed UMBC when they entered into the said agreement. By permitting the agreement to be worded the way it was they actively represented to the plaintiffs that the loan to UMBC was less than the total sale price.

[4] The effect of the defendants submission was that if the loan was more than the sale price, the agreement was void from the start and if it was less, the defendants could unilaterally increase their indebtness and thereby rely on their own wrong to repudiate their obligations to the plaintiffs and evade liability. This was not the sort of conduct the Court should countenance. The defendants contracted to sell their property for RM182,000 and the Court must hold them to their bargain.

[Application allowed with costs].

Legislation referred to:
Rules of the High Court 1980, O. 81

For the plaintiff - Krishna Aiyar; M/s. Majid, Krishna, Menon & Lee
For the defendant - Fiona Ghaus; M/s. Choong Yik Son & Fiona Ghaus

JUDGMENT

Mahadev Shankar J:

This is a matter in which I gave judgment in favour of the plaintiffs under O. 81 of the Rules of the High Court by way of specific performance of a sale and purchase agreement of a dwelling house (the said property). The defendants have appealed. My grounds now follow.

The sale and purchase agreement was dated 8 August 1990 (the said Agreement). It is a very formal document. By Clause 1 read together with section I and section II of the Second Schedule it is clear beyond any doubt whatsoever that the total purchase price was RM182,000 of which the plaintiff's were required to pay and did pay RM18,200 upon execution of the agreement.

As to the payment of the balance of the purchase price of RM163,800 section III of the Second Schedule provided as follows:

Mode of Payment of Balance Purchase Price

> The balance purchase price of Malaysian Ringgit One Hundred And Sixty Three Thousand Eight Hundred (RM163,800) Only shall be paid by the Purchasers' in the following manner:
>
> (a) a sum sufficient to redeem the existing assignment by way of security to United Malayan Banking Cooperation Bhd. (hereinafter called the Lender). This sum shall be paid to the purchasers' solicitors as stakeholders.
> (b) the remaining balance, if any, shall be paid to the vendors' solicitors to be held as stakeholders.
>
> The monies under (a) and (b) above shall be paid to the respective solictors in (a) and (b) within Three (3) months from the date of this Agreement, failing which an extension of one (1) month shall be granted to pay the balance purchase price with interest thereon at the rate of ten (10) per cent per annum calculated on a day to day basis.

At the time the said agreement was drafted it is clear that both parties envisaged that the redemption sum due to be paid to the lender (UMBC) was less than RM163,800 because it was the balance from this amount which the plaintiff's solicitors were to withold and pay over to the vendors solictors as stakeholders after retention of the redemption sum required. These payments were to be made as aforesaid by 8 November 1990 failing which an extension of one further month was to be given.

By 13 September 1990 the plaintiff's Bankers had approved a loan of RM160,000 on the security of the property. The plaintiffs thereupon deposited a further RM3,800 cash with their solicitors. By a letter dated 22 September 1990 the plaintiff's solicitors gave the defendants solicitors notice that they were able to pay the balance of the purchase price.

To make good title to the property it was necessary for the loan outstanding to the lender to be cleard. Since the purchase price both parties had agreed to was RM182,000 that was the maximum extent of the plaintiffs' contribution towards that loan. They had paid RM18,200 cash and now stood ready to pay the balance of RM163,800.

When the plaintiffs solicitors wrote to defendants solicitors on 22 September 1990, the plaintiffs solicitors also wrote to the UMBC on the same day. On 14 November 1990 UMBC responded direct to the plaintiff's Bankers Malayan Banking Berhad. They confirmed that the redemption sum due to be paid by the defendants on or before 30 November 1990 was RM203,260.36.

The difference that had to be paid to UMBC by the defendants was RM43,260.36. The plaintiffs solicitors wrote to the defendant's solicitors on 29 November 1990 requiring them to confirm that the defendants would pay this amount. This the defendants refused to do. The sale could not be put through. So the plaintiffs brought this action.

The defendants seek to evade liability to complete by putting their own interpretation upon Clause 8 of the said agreement and the Third Schedule. They contend that if the redemption sum to the UMBC was in excess of RM182,000 the said agreement was null and void. Since the UMBC's letter dated 14 November 1990 stipulated that it was RM203,260.36 they contend that the said agreement was no longer enforceable.

Clause 8 reads as follows:

Express Conditions

> Sale Subject To Overiding Special Conditions
>
> The parties hereto expressly convenant and agree that the sale and purchase of the said property shall in addition to the terms and conditions herein provided be further subject to the Special Express Conditions set out in the Third Schedule hereto and in the event of any conflict discrepencies or variance the Special Express Conditions set out in the Third Schedule shall prevail.

The Third Schedule reads as follows:

Overriding Condition

> 1. An initial sum of two percent (2%) of Malaysian Ringgit RM3,640 being part of the 10% deposit has been paid directly to the vendors on 31 March 1990, prior to the execution of this agreement.
> 2. The balance of the deposit of Malaysian Ringgit Fourteen Thousand and Five Hundred and Sixty (RM14,560) only amounting to eight percent (8%) has been paid to the vendors' solicitor vide an MBB cheque, No. 110016, as stakeholders **and**

such sum shall be released by the said stakeholder upon receipt by the solicitor of the following written confirmations:

(a) confirmation from the developer; Superview Development Sdn. Bhd. of No. 1023-1034, 1st Floor, Resource Complex, Jalan Segambut Atas, Segambut, 51200 Kuala Lumpur.

(i) that the full purchase price of RM280,000 has been paid under the sale and purchase agreement (hereinafter referred to as the Principal Agreement) dated 3 April 1984, by the vendor to the developer above named.

.(ii) that there are no outstanding sums/interest that still remains unpaid.

(iii) that the vendor is not in breach of any terms(s) and/or obligation(s) under the said principle agreement.

(iv) that the developer confirms that the vendor is the beneficial owner and that save for the assignment by way of security in favour of United Malayan Banking Cooperation Berhad, (hereinafter called the lender), there are no subsequent assignments.

(b) The lender confirms that the outstanding sum due and owing by the vendor to the lender does not exceed RM182,000.

Vacant possession of the said property shall be delivered to the purchasers by the vendors upon full payment of the balance purchase price to the vendors chargee bank. (emphasis added).

A careful reading of the Third Schedule shows quite clearly that the pre-conditions stipulated in sub-clauses (a) and (b) were linked to the terms on which the vendors' solicitors were authorised to release the sum of RM14,560 to the vendors. Nowhere does it stipulate that if the amount owing to the UMBC was in excess of RM182,000 the said agreement was to be annulled. The last sentence in the Third Schedule makes it clear beyond any doubt that it was an independent and overriding condition that vacant possession had to be delivered to the plaintiffs by the defendants upon full payment of the balance purchase price to the UMBC. This the plaintiffs were ready and willing to do and so offerred.

Consequently I reject the defendants suggestion that Clause 2(b) had to be fulfilled before the sale could be put through. It had to be fulfilled only if the defendants wished to lay their hands on the RM14,560 held by their solicitors as stakeholders.

There is another way of looking at this disingenous submission. The defendants must have known what they owed the UMBC when they entered into the said agreement. By permitting it to be worded the way it was they actively represented to the plaintiffs that the loan to the UMBC was less than RM182,000 i.e. the total sale price. If in reality the amount then was more than RM182,000 the effect of their submission is that the said agreement was void from the start. If it was less, then the effect is that by unilaterally increasing their indebtness to the Bank they could repudiate their obligations to the plaintiffs and thus rely upon their own wrong to evade liability.

This is not the sort of conduct which this Court should countenance. These defendants, for reasons of their own contracted to sell for RM182,000 and the Court must hold them to their bargain.

The second line of defence is not worthy of any credence. It was submitted that because the Developer said there were sums due and payable then Clause 2(a)(ii) of the Third Schedule applied to abort the sale. In addition to what I have already said about the overall effect of the Third Schedule, it is to be noted from the Developer's letter dated 24 October 1990 (Enc.5 Ex. MS.6) that the Developer had given their consent to this transfer. Nothing is due to the Developer except for Water and Electricity.

This was a clear and obvious case where summary judgement should be given to the plaintiffs and I so ordered with costs.